Supreme Court, U. S.
FILED
DEC 6 1980
MICHAEL RODAK, JR., CLERK

80-948

No. _____

IN THE

Supreme Court of the United States

October Term, 1980

ARMORED TRANSPORT, INC.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

Armored Transport was initially indicted for an alleged felony violation under the Sherman Act, 15 U.S.C. § 1. Because the grand jury term had expired when the indictment issued, the Court of Appeals for the Ninth Circuit ruled it invalid. However, judgment against the corporation on a plea of *nolo contendere* was sustained on the theory that the government was not required to prosecute a corporation for a felony violation of the Sherman Act by indictment, and could have done so by information alone.

Thus, the questions presented are:

1. Can a corporation charged with a felony violation of the Sherman Act be denied the Fifth Amendment guarantee of indictment by grand jury?

2. When the government has prosecuted by indictment, and a judgment has been entered pursuant to a *nolo contendere* plea made without knowledge of the jurisdictional invalidity of the indictment, can the judgment which would otherwise be vacated nevertheless be upheld on the basis that the prosecution *could have been* instituted by information?

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ARMORED TRANSPORT, INC.,

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vs.

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Respondent.

Petition For a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner Armored Transport, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on October 7, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 629 F.2d 1313 (9th Cir. 1980), is set forth herein as Appendix A. The opinion of the United States District Court for the Central District of California has not been reported, and is set forth herein as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on October 7, 1980. This petition for writ of certiorari was timely filed within sixty days therefrom, pursuant to Supreme Court Rule 20.1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

U. S. Constitution, Amendment V provides in pertinent part:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . .

15 U.S.C. § 1 provides in pertinent part:

> Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by a fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

18 U.S.C. § 1(1) states:

> Notwithstanding any Act of Congress to the Contrary:
>
> (1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.

STATEMENT OF CASE

In early 1979, a grand jury indictment was filed against petitioner Armored Transport, Inc. ("the Company"), alleging a felony violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The Company ultimately pleaded *nolo contendere* and was fined $200,000.

Less than a month after the entry of judgment, the attorney who was once responsible for the Justice Department's prosecution of the Company filed an *amicus curiae* motion to vacate the judgment, to allow withdrawal of the *nolo contendere* plea and to dismiss the indictment. The Company joined the motion in all respects, arguing that the indictment was a nullity since it had been returned after the term of the grand jury had expired,[1] and therefore the District Court lacked jurisdiction.

In its opposition to this motion, the United States included a footnote which argued, for the first time in the proceedings, that even if the indictment was invalid the judgment should be upheld because prosecution could have proceeded by information. The government urged that no Fifth Amendment grand jury rights inured to the Company because the indictment clause was applicable only to defendants who could be incarcerated for a term greater than one year. Hence, a corporation was guaranteed no Fifth Amendment rights in a felony prosecution since it could not be imprisoned.

The District Court filed an opinion and order on August 23, 1979 (included herein as Appendix B) denying the motion

[1] The issue of whether the indictment was a nullity depended on when the grand jury began to "serve." Under Rule 6(g) of the Federal Rules of Criminal Procedure, no grand jury may serve more than eighteen months. The grand jury involved had been impanelled on August 26, 1977, and returned the indictment on March 9, 1979, more than eighteen months after impanelment.

in all respects. The court held that the indictment was timely returned. To further bolster and insulate its ruling, the District Court also stated that the Company had no right to an indictment under the Fifth Amendment, and that the indictment could be treated as an information.

The Company timely appealed to the United States Court of Appeals for the Ninth Circuit. That court invalidated the indictment as the Company urged, holding that the grand jury term had expired. Nonetheless, the court did not reverse the judgment but went on to hold:

> We decline to reverse Armored Transport's conviction, however. Because the crimes charged are not infamous within the meaning of the fifth amendment, and because the government could, therefore, have proceeded by information, the conviction is affirmed.
>
> * * *
>
> Under the punishment provision of 15 U.S.C. § 1, as amended in 1974, a corporation is potentially subject to a fine not exceeding one million dollars if convicted. Since indictment is constitutionally required only when a defendant is potentially subject to an infamous punishment, Armored Transport has no right to indictment because a fine is not such a punishment.

App. A-2, A-9 (footnotes omitted).

REASONS FOR GRANTING THE PETITION

1. This Case Presents Important Constitutional Issues of General Applicability.

The Ninth Circuit opinion effectively rewrites the Fifth Amendment and its history. The decision is inconsistent with the language of the Constitution, the purposes and policies which underlie the guarantee of a grand jury indictment, and numerous decisions of this Court and lower federal tribunals.

Contrary to the centuries-old understanding that all accused felons were entitled to grand jury protection, the Court of Appeals in this far-reaching ruling held that there is no right to a grand jury indictment on a felony charge solely because the defendant cannot be imprisoned. Despite its acknowledgment that a corporation may face economic ruin from a felony conviction without the protection of a grand jury indictment, it nonetheless squarely held that the potential punishment to which the defendant can be subjected is the *only* standard for defining "infamous crime" under the Fifth Amendment. App. A-9. This new rule of law in the Ninth Circuit will have an immediate and recurring impact[2] upon corporations, as well as fictional entities such as partnerships, unincorporated associations and others who cannot be imprisoned.[3]

Though it recognized that what is thought to be "infamous" may change over time, as this Court earlier expressly noted in *Mackin v. United States,* 117 U.S. 348, 351 (1886), the Court of Appeals' opinion would tie the definition exclusively to the potential punishment. Moreover, the Ninth Circuit concedes that its ruling compels the totally anomalous result that the same crime is infamous when natural persons are charged and not infamous when corporations or like entities are charged. Not only is this incongruous treatment unjustified by

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[2] In *United States v. Yellow Freight System, Inc.,* ..... F.2d ..... (9th Cir. Oct. 17, 1980) (slip op.), the Ninth Circuit held that a corporation charged with a violation of the Elkins Act, 49 U.S.C. § 41(1), (3), was not entitled to an indictment, partly because "[a] fine, regardless of its amount, cannot be infamous punishment," citing as authority the decision below.

[3] In a footnote to its opinion, the Court of Appeals stated, "We leave open the question whether infamous punishments might be fashioned in the future that could be inflicted upon corporations" (App. A-9 n.3). However, the Court of Appeals' recognition that the fine here might ruin the corporation and its holding that the inability to be incarcerated is determinative of indictment rights plainly means that no corporation is entitled to indictment for any charge whatsoever.

any of the policies supporting the guarantee of an indictment, it also constitutes an unacceptable construction of the words of the Constitution.[4]

The deprivation by the Ninth Circuit of the fundamental Constitutional right to an indictment in felony cases requires that certiorari be granted.

2. The Ninth Circuit's Construction of the Constitution and Applicable Supreme Court Authorities Is Unique Among the Circuits.

The Court of Appeals candidly recognized that, in addition to those cases looking to the potential punishment available, another line of authority holds that all felony prosecutions must be begun by indictment. App. A-8. It failed, however, to recognize first that these lines of cases contain two tests which are distinct but not disharmonious, and second that, depending on the circumstances, the scope of the Fifth Amendment can be measured by looking to various factors, including the nature of the crime, the potential punishment, and legislative intent, among others. *United States v. Yellow Freight System, Inc.*, __ F.2d __ (9th Cir. Oct. 17, 1980) (slip op.). This failure had its genesis in not appreciating the long-established understanding that all crimes classified as felonies are considered sufficiently serious or infamous to warrant grand jury protection.

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[4] The result is even more remarkable since corporations can only act through persons. *E.g., United States v. Hougland Barge Line, Inc.*, 387 F. Supp. 1110, 1113 (W.D. Pa. 1974). Individuals can be sentenced to three years imprisonment for a felony violation of Section 1. Criminal antitrust liability can be imposed on a corporation for the acts or omissions of its agents within the scope of their employment. *E.g., United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1004 (9th Cir. 1972). Thus, a corporation's agent who violates Section 1 must be indicted by a grand jury because he has committed an infamous crime, but the corporation, which is liable only because that very agent's identical conduct is imputed to it, need not be indicted because it has *not* committed an infamous crime.

In *Ex parte Wilson,* 114 U.S. 417 (1885), this Court clearly stated that the Founding Fathers, in drafting the indictment clause, adopted the rule of the common law that indictments were required in all felony prosecutions:

> By the law of England, informations by the Attorney-General, without the intervention of a grand jury, were not allowed for capital crimes, nor for any felony, by which was understood *any offense which at common law occasioned a total forfeiture of the offender's lands, or goods, or both.* . . . The question whether the prosecution must be by indictment, or might be by information, thus depended upon the consequences to the convict himself. The Fifth Amendment, declaring in what cases a grand jury should be necessary and in effect affirming the rule of the common law upon the same subject, *substituting only for capital crimes or felonies,* "a capital or otherwise infamous crime," manifestly had in view that rule of the common law. . . .

Ex parte Wilson, 114 U.S. at 423 (emphasis added; citation omitted).

Apart from the decision below, it has been commonly understood that all felonies are "infamous crimes" within the meaning of the Fifth Amendment and that the punishment allowed for any crime reflects a legislative and societal judgment of the crime's seriousness. *See Baldwin v. New York,* 399 U.S. 66, 68 (1970). In the context of crimes committed by natural persons, to establish statutory classifications (*e.g.,* felonies, misdemeanors, and petty offenses), the simple rule of thumb employed has been the punishment imposed. *Baldwin, supra,* 399 U.S. at 68-70. Thus, imprisonment up to or exceeding one year is sufficient to describe the benchmark between felonies and misdemeanors committed by natural persons, as reflected in 18 U.S.C. § 1(1). The Fifth Circuit has succinctly stated this hornbook principle as it applies to the indictment clause:

> The offenses charged are not punishable by imprisonment for a term exceeding one year, and are therefore not

> felonies or infamous crimes, but misdemeanors, which may be prosecuted upon information instead of upon indictment.

Christian v. United States, 8 F.2d 732, 733 (5th Cir. 1925).

Even in the case of natural persons, however, felonies are not always delineated by reference to imprisonment alone. *E.g., Ex parte Wilson, supra,* 114 U.S. at 423 (one indicator of common law felony is forfeiture of property). *Yellow Freight, supra* (enumerating other indicia of infamy).

The decisions of this Court and numerous others spanning a century have consistently reflected the understanding that a felony charge triggers the indictment clause guarantee. *Mackin v. United States,* 117 U.S. 348, 350 (1886) (information without intervention of grand jury not allowed for capital crime nor for a felony); *Ex parte Bain,* 121 U.S. 1, 11-12 (1887) (no person charged with a felony could be tried without grand jury action); *Michel v. Louisiana,* 350 U.S. 91, 99 (1955) (in federal felony cases, indictment by grand jury is a matter of right). As recently as 1960, this Court unequivocally stated:

> The crime charged here is a felony and the Fifth Amendment requires that prosecution be begun by indictment.

Stirone v. United States, 361 U.S. 212, 215 (1960).

The decisions of other federal tribunals also reflect the general equation of "felonies" and "infamous" crimes. *United States v. Pandilidis,* 524 F.2d 644, 647 (6th Cir. 1975), *cert. denied,* 424 U.S. 933 (1976); *Gaither v. United States,* 413 F.2d 1061, 1066 (D.C. Cir. 1969); *Thorm v. United States,* 59 F.2d 419 (3d Cir. 1932); *Falconi v. United States,* 280 F. 766, 767 (6th Cir. 1922), *cited with approval in Duke v. United States,* 301 U.S. 491, 494 (1937); *Christian v. United States,* 8 F.2d 732, 733 (5th Cir. 1925); *Application of Jordan,* 439 F. Supp. 199, 206 (S.D.W. Va. 1977); *Wittenberg v. United States,* 366

A.2d 128, 131-32 (D.C. App. 1976). Other cases use "serious" and "infamous" interchangeably. *E.g., Smith v. United States,* 360 U.S. 1, 9 (1959); *United States v. Moreland,* 258 U.S. 433, 448 (1922) (Brandeis, J. dissenting); *United States v. Haldeman,* 559 F.2d 31, 123 (D.C. Cir. 1976), *cert. denied sub nom. Ehrlichman v. United States,* 431 U.S. 933 (1977); *Gaither, supra,* 413 F.2d at 1066.

Rather than launch a frontal attack on *Stirone* and similar cases which, by considering the nature or seriousness of the crime, naturally equate "felony" with "infamous," the Court of Appeals purported to harmonize them with other cases which define the applicability of indictment clause in terms of the potential punishment. It attempted this unnecessary harmonizing process[5] by reasoning that since 18 U.S.C. § 1(1) provides that any offense punishable by death or imprisonment for a term exceeding one year is a felony, "*Stirone* can be construed to hold" that only the punishment available, and not the nature of the crime, can be considered. App. A-8. In fact, the appellate court's "construction" of the *Stirone* line in light of 18 U.S.C. § 1(1) is even more limited. It would look only to the punishment that can be applied to the *particular defendant charged* rather than to all punishments which are available by statute for the offense. With respect to the Sherman Act, in 1974, Congress reclassified violations from misdemeanors to felonies and increased the maximum fines and prison sentences

[5] The most cursory examination of the cases cited by the Ninth Circuit as included among the "infamous punishment" line of authority (App. A-7–A-8) reveals that those cases do not stand for the proposition that the *sole* measure of the indictment clause's protective scope is the maximum potential punishment imposed on the particular defendant charged. Most of those decisions involved misdemeanor violations in which the courts carefully examined the punishment to determine whether the consequences to the individual, despite the crime's legislative classification, were severe enough to guarantee to the defendant the Fifth Amendment's protection. As explained by this Court, the most objective and relevant criterion for determining whether an offense is serious or petty is the severity of the maximum authorized penalty. *Baldwin v. New York,* 339 U.S. 66, 68 (1970). But the nature of the crime itself can be considered in appropriate circumstances, as the Ninth Circuit clearly recognized (App. A-7; *Yellow Freight, supra*) but in this case ignored. App. A-10.

which can be imposed upon conviction. Section 3, Pub. L. 93-528, 88 Stat. 1708 (Dec. 21, 1974), *codified at* 15 U.S.C. § 1.[6] For natural persons, Congress increased the prison sentence from one to three years. Because corporations by definition cannot be imprisoned, Congress concomitantly increased the equivalent corporate penalty for a felony conviction tenfold to $1 million.

Despite the clear legislative judgment that a Sherman Act offense is serious,[7] the Ninth Circuit's view of *Stirone*—construed in light of its restrictive reading of 18 U.S.C. § 1(1)'s felony definition—necessarily means that corporations and like entities can never be charged with or convicted of felonies because they can never be punished by death or imprisonment. Such a ruling, if allowed to stand, would grant corporations an immunity from felony prosecution never contemplated by Congress. It would also snatch from these defendants the common law and constitutional right to indictment for serious crimes. Finally, it would remove all flexibility from the definition of "infamous crimes" and "felonies," confining both to consideration of prison terms in factual contexts where flexibility is required. *See Fitzpatrick v. United States*, 178 U.S. 304, 307 (1900) (failure to impose death penalty does not make murder anything less than a capital crime).

Such far-reaching and bizarre consequences require review.

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[6] A review of the legislative history of this amendment leaves no doubt that Congress considered a Section 1 violation to be "infamous" or "serious." *See, e.g.*, 119 Cong. Rec. 24597, 24599, 24600 (1973); 120 Cong. Rec. 10761, 10762, 10763, 10764, 10765, 10766 (1974). *See also* H. R. Rep. No. 93-1463, *reported at* 1974 U.S. Code Cong. & Adm. News 6535, 6540 (1974).

[7] Representative Mayne, for example, stated on the House floor:

> "Antitrust violations should not be dismissed as merely misdemeanors or technical violations. They cause greater economic injury to the public than do many other felonies. Hopefully increased jail sentences and higher fines will serve to deter individuals and companies from flouting antitrust prosecution." 120 Cong. Rec. 10765 (1974).

3. The Fifth Amendment Requires That Felony Charges Be Prosecuted By Indictment.

The Court of Appeals' construction of *Stirone* and other authorities totally excludes the possibility that crimes are or can be made infamous or serious by their nature or by Congressional declaration, absent the possibility of substantial incarceration. The policies and purposes underlying the Fifth Amendment's indictment clause are not consistent with such a rule and do not suggest that the protections afforded are inapplicable to corporations. Indeed, the Ninth Circuit totally failed to address the salient purposes which the indictment clause subserves or to enumerate any reasons why the Amendment's protective umbrella should not cover corporations or any entity which can be accused of a felony. This critical omission is all the more ironic in view of the court's lengthy quote from *United States v. Mackin* which compels the conclusion that due "regard [must be given] to the object and the terms of the Amendment, as well as to the history of its proposal and adoption, and to the early understanding and practice under it. . . ." 117 U.S. at 351, quoted App. A-7.

This cavalier disregard of the guarantees embodied in the Bill of Rights stands in stark contrast to analogous protections long afforded to corporations by this Court, and to the careful analysis this Court undertakes in construing such fundamental constitutional provisions. For example, in *Hale v. Henkel,* 201 U.S. 43, 76 (1906) the Fourth Amendment protection against unreasonable searches and seizures was held applicable to corporations for the following reasons:

> A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body. Its property cannot be taken without compensation. It can only be proceeded against by due process of law, and is protected, under the 14th Amendment, against unlawful dis-

> crimination. *Gulf, C. & S. F. R. Co. v. Ellis,* 165 U.S. 150, 154, 41 L. ed. 666, 667, 17 Sup. Ct. Rep. 255, and cases cited. Corporations are a necessary feature of modern business activity, and their aggregated capital has become the source of nearly all great enterprises.

In the same vein, the Sixth Circuit recently cautioned against reaching the casual conclusion that rules phrased in terms of individuals do not apply to corporations. It did so in the context of the right to trial by jury which the government argued hinged on the ability to be imprisoned. The court held squarely that the right applies to corporations and stated:

> We . . . reject the government's simplistic argument that since the rule . . . was phrased in terms of imprisonment of individuals it has no applicability to corporations which cannot be imprisoned. Such argument . . . ignores the fundamental principle that corporations enjoy the same rights as individuals to trial by jury. . . .

United States v. R.L. Polk & Co., 438 F.2d 377, 379 (6th Cir. 1971).

The foundational reasons for the Fifth Amendment indictment requirement are underscored in even the earliest cases. These decisions emphasize that the Government may not impose the onus of a felony accusation or the risk of severe penalties upon criminal defendants without also shouldering the burden of presenting its facts to an independent group of citizens. For example, in *Jones v. Robbins,* 8 Gray 329, 349 (Mass. 1857), Chief Justice Shaw stated the purpose of the Fifth Amendment protection:

> To make a marked distinction between crimes of great magnitude and atrocity, and to secure every person against accusation and trial for them without the previous interposition of a Grand Jury, but to leave minor and petty offenses to be prosecuted without these formalities.

This Court has long recognized the importance to the defendant charged with a felony of appearing before a grand jury prior to criminal prosecution. *Ex parte Bain, supra,* 121 U.S. at 12. Recently, the significance of the grand jury's "screening" function in ferreting out clearly innocent suspects was expressed in *United States v. Dionisio,* 410 U.S. 1, 16-17 (1973), as follows:

> The Fifth Amendment guarantees that no civilian may be brought to trial for an infamous crime "unless on a presentment or indictment of a Grand Jury." This constitutional guarantee presupposes an investigative body "acting independently of either prosecuting attorney or judge," *Stirone v. United States,* 361 U.S. 212, 218, *whose mission is to clear the innocent, no less than to bring to trial those who may be guilty.* (Emphasis added.)

Under the Ninth Circuit's approach, where a corporation is involved the "mission . . . to clear the innocent" can and never will be accomplished.

In *Wood v. Georgia,* 370 U.S. 375, 390 (1962), the Court announced other important objects of the grand jury process which are denied in corporate prosecutions under the Court of Appeals' opinion:

> Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive prosecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.

The stigma of prosecution for a felony or serious crime attaches well before conviction for a corporation as well as for an individual. Contrary to the approach of the Court of Appeals, it is not the concern for deprivation of liberty or even

payment of a substantial monetary penalty that the grand jury is to protect against. App. A-9. The ultimate procedures required at trial on the merits are the safeguards for these concerns. It is the anticipatory damage to reputation, and "the trouble, expense, and anxiety of a public trial" involved in answering an unfounded charge from the outset that the interposition of the grand jury is designed to prevent. *Ex parte Bain,* 121 U.S. at 12. This damage is as real for corporations as for natural persons. Indeed, the net damage to reputation will be greater when a corporation stands accused than for an individual, both because the acts involved must necessarily be those of natural persons as agents and because the embarrassment and obloquy will be attributed to officers, owners, employees and other representatives alike. Adverse publicity concerning the corporation accused of a felony will also affect its credit, sales and goodwill. Moreover, all these hardships are exacerbated in the Sherman Act context. Before this ruling, private treble damage actions commonly followed swiftly on the heels of an indictment; now those private civil cases may follow the filing of a meritless information by a single misguided prosecutor. Ultimate economic ruin may result to the corporate body and dire consequences may affect all those associated with it. Indeed, even apart from any civil liability considerations, the record below shows that the maximum fine in this action would have rendered the corporate defendant inoperable.

Thus, the goals and policies underlying the Fifth Amendment guarantee of indictment compel that this Court's writ issue.

4. When The Government Proceeds By Indictment, An Invalid Judgment Entered Thereon Cannot Stand Even If Prosecution *Could Have Been* Pursuant To Information.

The Ninth Circuit's opinion also undermines significant Due Process protections guaranteed to defendants. Defective indictments simply cannot be salvaged through speculation that

prosecution could have been initiated by information in the first place. *See, e.g., United States v. Pandilidis,* 524 F.2d 644, 647 (6th Cir. 1975), *cert. denied,* 424 U.S. 933 (1976); *United States v. Goldstein,* 502 F.2d 526, 531 (3d Cir. 1974) (en banc). The prohibition of such a tactic is rooted in the principle that, having obtained various advantages through use of the grand jury process, the government cannot subsequently seek to evade the protection which that process is designed to provide defendants. Such advantages include, *inter alia,* the development of testimony under oath and records under subpoena, and the significant lever of an actual indictment.

The Court of Appeals recognized the constitutional validity of the rule of *Pandilidis* and *Goldstein, supra,* App. A-10. It held, however, that a prosecution begun by an invalid indictment need proceed under the rules governing indictment only if the defendant would otherwise be prejudiced. This is clearly contrary and in direct conflict with at least the Third Circuit en banc decision in *Goldstein* which held that a defect in the indictment is automatically prejudicial. It is also inconsistent with the fundamental principle that jurisdictional defects cannot be cured[8] by simply rewriting the record based on hindsight. As the *Goldstein* court held (502 F.2d at 531):

> Rights of an accused in a criminal proceeding which are valuable to him should not be limited or taken away by construction. Where there is doubt, it should be resolved in favor of the defendant.

However, even if prejudice is required, such a showing is plain here. When entering its plea, the Company had no reason to doubt the validity of the indictment. Hence its pleading decision was adversely influenced by the fact that the government held over its head an actual indictment, not simply a self-serving information. If it were being prosecuted by information

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[8] An indictment returned by a grand jury whose term has expired is a nullity and creates a nonwaivable jurisdictional defect which can be raised at any time during the proceedings. *See, e.g., United States v. Gale,* 109 U.S. 65, 72 (1883); *United States v. Macklin,* 523 F.2d 193 (2d Cir. 1975); *United States v. Fein,* 504 F.2d 1170 (2d Cir. 1974).

only, as the Ninth Circuit ultimately held, it had a right to know this so that it could knowingly and intelligently decide how to plead.

CONCLUSION

For all of the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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DATED: December 5, 1980

APPENDIX A

In the United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. ARMORED TRANSPORT, INC., *Appellant-Defendant.*	**No. 79-1620** **D.C. 79-198-MML** **OPINION**

Appeal from the United States District Court for the Central District of California

Argued and Submitted May 7, 1980

Before: FARRIS, NELSON, Circuit Judges, and JAMESON*, District Judge.

NELSON, Circuit Judge:

This appeal presents several issues of first impression in this circuit. The primary question is when does a federal grand jury commence service for the purposes of Rule 6(g), Fed. R. Crim. P., which provides that "no grand jury may serve more than 18 months." The District Court held that the life of the grand jury is measured from the date on which it is authorized to begin serving, rather than the date on which it is impaneled and sworn. We disagree. For purposes of Rule 6(g) the life of a grand jury commences on the impanelment date. The

* Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

indictment against Armored Transport was handed down more than eighteen months after the grand jury in this case was impaneled and is invalid.

We decline to reverse Armored Transport's conviction, however. Because the crimes charged are not infamous within the meaning of the fifth amendment, and because the government could, therefore, have proceeded by information, the conviction is affirmed.

STATEMENT OF FACTS

On March 9, 1979, the grand jury [herein, the Martin grand jury] returned an indictment against appellant Armored Transport, Inc. and two of its officers, Irvin and DeSalvo, alleging felony violations of Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976). The Martin grand jury was impaneled and given the oath of impanelment on August 26, 1977. Jurors were then excused from the courtroom and told to return when notified by the United States Attorney's office by mail. Evidence was first heard on October 17, 1977. The Martin grand jury's term was extended twice by court order to March 10, 1979. The indictments were returned on March 9, 1979.

Pursuant to a plea bargaining agreement, Armored Transport pleaded nolo contendere to the indictment and was fined $200,000. On June 28, 1979, a former Justice Department Antitrust Division lawyer who was once responsible for prosecuting this case, filed and served an amicus curiae motion to vacate judgments, to allow withdrawal of pleas, and to dismiss the indictment. The amicus motion argued that the original indictment was rendered by the grand jury after its term had expired, and was a nullity. It also suggested that the Government had a duty to disclose information pertinent to the length of the grand jury's term prior to the entry of the nolo contendere plea. The defendants joined the amicus motion in all respects. The district court denied the motions. This appeal follows.

Only the appeal by Armored Transport remains. The appeals by Irvin and DeSalvo were voluntarily dismissed.

ANALYSIS

Rule 6(g), Fed. R. Crim. P., provides in pertinent part:

> A grand jury shall serve until discharged by the court but no grand jury may serve more than 18 months. The tenure and powers of a grand jury are not affected by the beginning or expiration of a term of court.

In this case, the Martin grand jury, was impaneled on August 26, 1977. Under Local Rule 16 of the Central District of California, the Government contends that service did not begin until the second Monday in September (September 12, 1977). The indictment was returned against appellant on March 9, 1979. If service began on September 12, 1977, then the indictment is within the eighteen month period. If, however, the first date of service is the impanelment date, the indictment is invalid because handed down by an expired grand jury. *United States v. Macklin,* 523 F.2d 193, 195 (2d Cir. 1975); *United States v. Fein,* 504 F.2d 1170, 1173 (2d Cir. 1974). Such a defect—that the grand jury lost its power to hand down indictments—is jurisdictional and may be raised at any time. *Macklin,* 523 F.2d at 195; ***But see Shimon v. United States,*** 352 F.2d 449, 450-51 (D.C. Cir. 1965); *United States v. Mitchell,* 389 F. Supp. 917, 919-20 (D.D.C. 1975), *aff'd on other grounds,* 559 F.2d 31 (D.C. Cir. 1976), *cert. denied,* 431 U.S. 933 (1977).

The District Court held that Rule 6(g) does not require the date upon which a grand jury begins service to be the impanelment date, and that the Central District of California can properly determine when a grand jury starts service. Local Rule 16 provides in relevant part:

> For the purpose of empaneling both grand and petit jurors sessions of the court in all divisions of this district shall commence on the first Monday in March and the second Monday in September.
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> . . . .

> As soon as practicable, before or after commencement of each session of the court, veniremen shall be empaneled and sworn to serve during the ensuing session and until ordered discharged by the court.

Rule 57(b), Fed. R. Crim. P., provides that "[i]f no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute." Because Rule 6(g) does not specifically prescribe the procedures laid down by Local Rule 16, the question before this court is whether Local Rule 16 is inconsistent with Rule 6(g).

First, we note that prior decisions dealing with grand jury terms and Rule 6(g) do not decide the issue presented here. *See, e.g., In re Special Grand Jury Impaneled February12, 1976,* 565 F.2d 1225 (1st Cir. 1977); *United States v. Stofsky,* 527 F.2d 237 (2d Cir. 1975), *cert. denied,* 429 U.S. 819 (1976); *Wax v. Motley,* 510 F.2d 318 (2d Cir. 1975). These decisions simply assume that the date of commencment of service of the grand jury is the impanelment date. In the course of addressing other issues, such as whether a court may extend a grand jury beyond eighteen months, *see, e.g., United States. v. Fein,* 504 F.2d 1170 (2d Cir. 1974), these courts use the date of impanelment and swearing as the start of the eighteen month period. So the issue whether Rule 6(g) permits a local district to separate the commencement of grand jury service from the impanelment date is one of first impression.

Armored Transport argues that the legislative history of Rule 6(g) requires the impanelment date to be the first day of service for the grand jury. We agree. The major purpose of an eighteen month limitation was to establish a uniform limitation on the life of the grand jury.[1] *United States v. Fein,* 504 F.2d at 1176. This purpose is most clearly served by a bright line

[1] The 18-month limitation was first enacted as an amendment to 28 U.S.C. § 421, Act of Apr. 17, 1940. 54 Stat. 101. Rule 6(g) is the successor to 28 U.S.C. § 421.

rule that a grand jury commences service on the impanelment date. The alternative rule, that each local district may separate impanelment and service, raises the possibility that one district could impanel a grand jury to commence service in six months and another district could authorize service to begin even a year after impanelment. Although the time span in this case is only two weeks, we consider that uniformity in grand jury service is seriously compromised once separation of the impanelment date and commencement of service is permitted.

Further, we are concerned about the logical basis of a rule that permits creation of a grand jury that has no concomitant power to act. The purpose of the grand jury is to hear testimony and to consider whether an indictment should be handed down against the person charged. It makes little sense to create such a body but to withhold its power until a later time. The more sensible rule, and one that is clearly consistent with the purpose of Rule 6(g), equates the commencement of grand jury service with the power of that body to act. Moreover, the government has admitted that, under certain circumstances, a grand jury that has been impaneled and sworn could be called to serve *before* that date of service specified by Local Rule 16. This suggests that the power to act arises upon the impanelment date.

A second purpose of Rule 6(g) was to sever the prior relationship between the commencment of the grand jury term and the terms of court. *United States v. Fein,* 504 F.2d at 1176. Rule 6(g) provides that "[t]he tenure and powers of a grand jury are not affected by the beginning or expiration of a term of court." But Local Rule 16 provides for grand jury service to commence in conjunction with the start of court sessions. The local district can impanel a grand jury on whatever date it chooses, including the start of a court session, but to the extent that Rule 16 requires that grand jury service be tied to the commencement of a term of court it is inconsistent with Rule 6(g) and cannot be upheld.

The district court concluded that Rule 16 serves an important local purpose, namely, it allows for efficient processing of numerous grand jury candidates and accommodation of the Chief Judge's schedule. But there is no showing that administrative convenience could not be achieved equally well while also measuring the life of the grand jury from the impanelment date. A grand jury can be convened at any time, Fed. R. Crim. P. 6(a), either before or after the term of court commences, as considerations of administrative convenience dictate. Moreover, these administrative concerns are minimized in light of the fact that grand juries meet relatively rarely during their period of service. In this case the Martin grand jury sat a total of eleven times over the period from August 26, 1977 to March 10, 1979.

The District Court also found that the impaneling judge clearly intended the grand jury to commence its service from the date in September and not the date in August when the jurors were sworn. But the intent of the impaneling judge does not control here because we have concluded that Rule 6(g) requires grand jury service to commence on the impanelment date.

Despite the invalid indictment by grand jury, we affirm the District Court. Because the crimes charged are not infamous within the meaning of the Fifth Amendment and because the Government could have proceeded by information, the District Court correctly retained jurisdiction and sustained the plea entered by defendant.

The Fifth Amendment provides that "capital or otherwise infamous crimes" must be prosecuted by indictment. So, we must decide whether Armored Transport has been charged with an infamous crime. Appellant argues that all felonies are infamous crimes, and that since the Sherman Act expressly defines a violation of 15 U.S.C. § 1 as a felony, any defendant charged with such a violation may only be prosecuted by indictment. The District Court rejected this line of reasoning and held that the indictment clause of the fifth amendment does not extend to a corporation.

We need not consider whether corporations can ever be charged with infamous crimes. Our inquiry is concluded when we determine that Armored Transport has not been charged with such a crime. The Supreme Court has provided substantial, if somewhat ambiguous, guidance as to what constitutes an infamous crime. Early cases discuss two possible approaches to the definition of "infamous". A crime may be classified infamous either because of the nature of the crime, or because the potential punishment is infamous. *See Mackin v. United States,* 117 U.S. 348, 350-51 (1886); *Ex parte Wilson,* 114 U.S. 417, 422 (1885). The following language from *Mackin* is instructive:

> The leading word "capital" describing the crime by its punishment only, the associated words "or otherwise infamous crime" must, by an elementary rule of construction, be held to include any crime subject to an infamous punishment, even if they should be held to include also crimes infamous in their nature, independently of the punishment affixed to them. Having regard to the object and the terms of the Amendment, as well as to the history of its proposal and adoption, and to the early understanding and practice under it, no person can be held to answer, without presentment or indictment by a grand jury, for any crime for which an infamous punishment may lawfully be imposed by the court. *The test is whether the crime is one for which the statutes authorize the court to award an infamous punishment,* not whether the punishment ultimately awarded is an infamous one; *when the accused is in danger of being subjected to an infamous punishment if convicted, he has the right to insist that he shall not be put upon his trial, except on the accusation of a grand jury.*

117 U.S. at 350-51 (emphasis added). Subsequent decisions, relying on *Mackin* and *Ex parte Wilson,* interpret "infamous" by examination of the punishment imposed. *E.g., United States v. Moreland,* 258 U.S. 433 (1922) (imprisonment at hard labor

in the workhouse is an infamous punishment); *Parkinson v. United States,* 121 U.S. 281 (1887) (imprisonment in penitentiary is infamous punishment); *United States v. Driscoll,* 612 F.2d 1155 (9th Cir. 1980) (infamous crime is one punishable by more than one year imprisonment); *United States v. Johnson,* 585 F.2d 374, 377 (8th Cir. 1978) (crime punishable for no more than one year imprisonment is not infamous) *cert. denied,* 440 U.S. 921 (1979); *United States v. Pandilidis,* 524 F.2d 644, 649 n.7 (6th Cir. 1975) (infamous crimes are those that can result in incarceration in a penitentiary) *cert. denied,* 424 U.S. 933 (1976). *See also, United States v. May,* No. 79-1142 (9th Cir. July 3, 1980); Fed. R. Crim. P. 7(a), ("[A]n offense which may be punishable by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment.")

In addition to the above authority is a line of cases that holds that all felony prosecution be begun by indictment. *See, e.g., Stirone v. United States,* 361 U.S. 212, 215 (1960). However, a felony is defined in 18 U.S.C. § 1(1) (1976) as an offense that is punishable by death or imprisonment for a term exceeding one year. Thus *Stirone* can be construed to hold that an offense punishable by death or imprisonment for a term exceeding one year must be prosecuted by indictment. Again, then, our inquiry returns to the potential punishment triggered by the crime. Nor does statutory designation of the crime as a felony make the crime infamous. That designation was first placed in the Sherman Act by the Antitrust Procedures and Penalties Act, Sec. 3, Pub. L. No. 93-528, 88 Stat. 1706, 1708 (1974). The Procedures and Penalties Act also increased the maximum term of imprisonment for individual violators from one to three years and, in our opinion, the redesignation of the crime as a felony was intended only to make the Sherman Act conform to the general definition of felonies, *see* 18 U.S.C. § 1(1) (1976), and not to classify violations of the statute as infamous. *See* 120 Cong. Rec. 36, 338-39 (1974) (remarks of Rep. Rodino).

We now apply the above analysis to the present case. Under the punishment provision of 15 U.S.C. § 1, as amended in 1974, a corporation is potentially subject to a fine not exceeding one million dollars if convicted.[2] Since indictment is constitutionally required only when a defendant is potentially subject to an infamous punishment, Armored Transport has no right to indictment because a fine is not such a punishment.[3] We agree that the public's notion of what constitutes an infamous punishment varies from one age to another, *Mackin v. United States,* 117 U.S. 348, 351 (1886), but we disagree that a fine is as infamous a punishment to a corporation as a year of imprisonment, *e.g., United States v. Driscoll,* 612 F.2d 1155 (9th Cir. 1980), or hard labor, *e.g., United States v. Moreland,* 258 U.S. 433 (1922) is to an individual. Deprivation of liberty takes away from an individual his ability to work, to support and live with his family, to engage in social activity, and other highly valued attributes of living in our society. A corporation in violation of 15 U.S.C. § 1 can only suffer a monetary penalty.

While we sympathize with appellant's argument that a one million dollar fine may mean considerable hardship or even economic ruin to a corporation, the gravity of this consequence to a corporation seems no greater than the potential gravity of a large fine upon an individual. Clearly, an individual charged with an offense for which the maximum penalty is a fine is not constitutionally entitled to indictment by grand jury. Moreover, even potential deprivation of liberty has not been sufficient to require the constitutional protection afforded by the fifth amendment indictment clause. *See United States v. Driscoll,* 612 F.2d 1155 (9th Cir. 1980) (individual potentially subject

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[2] 15 U.S.C. § 1 (1976) provides in relevant part:
Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by a fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both punishments, in the discretion of the court.

[3] We leave open the question whether infamous punishments might be fashioned in the future that could be inflicted upon corporations.

to more than one year imprisonment); *United States v. Moreland,* 258 U.S. 433 (1922) (possibility of hard labor). The potential punishment must be infamous, and a fine, levied against either an individual or a corporation, simply does not fit within the meaning of that word, as interpreted by the Supreme Court.

We recognize the result of our holding is that an individual charged with a violation of 15 U.S.C. § 1 must be indicted but that a corporation charged with the same offense may be proceeded against by information. But an accused is not entitled to indictment unless "in danger of being subjected to an infamous punishment if convicted." *Mackin v. United States,* 117 U.S. at 351. An individual convicted of a violation of 15 U.S.C. § 1 is potentially subject to three years imprisonment whereas a corporation is potentially subject to no greater penalty than a one million dollar fine. The only punishment that is directly relevant to classification of a crime as infamous is the potential punishment that the statute imposes on the particular defendant being tried. Congress may treat different classes of defendants differently and it has done so here.

We conclude, therefore, that the right of indictment guaranteed by the fifth amendment does not extend to a corporation charged under 15 U.S.C. § 1. Because Armored Transport does not have the right to an indictment, the Government could have proceeded against it by information. In this circumstance, the District Court was not deprived by the invalid indictment of jurisdiction over the defendant.

An invalid indictment may be treated as a valid information, provided the defendant has no constitutional right to indictment and provided no prejudice results to the defendant. While we agree with the proposition stated by the Sixth and Third Circuits that "once the prosecution elects to proceed by indictment it must follow the rules developed to govern use of indictments," *United States v. Pandilidis,* 524 F.2d 644, 647 (6th Cir. 1975), reversal is required only where defendant

makes a sufficient showing that the process followed by the Government results in actual prejudice to any of the interests of the defendant protected by the indictment procedure. *Id* at 648.[4]

The error in this case is that the indictment against Armored Transport was issued after the grand jury term had expired. Because Armored Transport had no right to indictment under the fifth amendment, this error does not reach constitutional dimension. So the appropriateness of reversal must be determined under Rule 52(a), Fed. R. Crim. P., which provides:

> [A]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

We fail to perceive any substantial rights of the defendant that have been affected by the invalid indictment. The most that can be said is that if Armored Transport had known the impanelment date, it could have moved to dismiss the indictment before entering its plea of nolo contendere. But that would not have relieved it from a prosecution by information, which the Government could file at any time, Rule 7(a), Fed. R. Crim. P., subject to the applicable statute of limitations. Moreover, since Armored Transport chose to plead nolo contendere, any advantage created by the grand jury discovery process was not used by the Government against appellant at trial. We note further that even after the grand jury investigation was complete, information obtained during these proceedings could have been used against appellant if the government had decided to proceed by information instead of by indictment. *See* Fed. R. Crim. P. 6(e)(3)(A).

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[4] The *Pandilidis* court found no showing of prejudice to the defendant where amendment of a grand jury indictment was permitted without submission of that amendment to the grand jury as required under Rule 7(e), Fed. R. Crim. P., 524 F.2d at 649. *Contra, United States v. Goldstein*, 502 F.2d 526 (3d Cir. 1974) (even in misdemeanor cases, in which indictments are not constitutionally required, any amendment to an indictment without grand jury action results in automatic prejudice to defendant).

Because we hold that the indictment was handed down by an expired grand jury and is therefore invalid, we do not reach the other grounds asserted by appellant for invalidating the indictment.

For the reasons stated above, the conviction of Armored Transport is hereby AFFIRMED.

APPENDIX B

United States District Court

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *Plaintiff,* v. ARMORED TRANSPORT, INC., ROBERT IRVIN, and JOSEPH DESALVO, *Defendants.*	**NO. CR-79-198-MML** **ORDER RE MOTIONS TO VACATE JUDGMENTS AND ALLOW WITHDRAWAL OF PLEAS AND TO DISMISS INDICTMENT AND INFORMATION: MOTION IN THE NATURE OF A WRIT CORAM NOBIS AND FOR CORRECTION OF ILLEGAL SENTENCES, ALTERNATIVELY**

On March 9, 1978, an indictment against Armored Transport, Inc., Robert Irvin and Jospeh DeSalvo (hereinafter "the Armored Transport Defendants") for alleged felony violations of Section 1 of the Sherman Act, 15 USC §1, was filed with the Court. The defendants orginally plead not guilty, and filed motions to dismiss the indictment. On April 30, 1979, the Government filed a superseding information on a misdemeanor antitrust charge. Pursuant to a plea negotiation, the corporation plead nolo contendere to the indictment and the individual defendants plead nolo contendere to the misdemeanor charged in the information. The court dismissed all remaining charges. The defendants were sentenced on June 4, 1979.

On June 28, 1979, Raymond P. Hernacki, formerly with the Justice Department Antitrust Division and responsible at one time for prosecuting this case against the Armored Transport defendants, filed amicus curiae motions to vacate the

judgments, to allow the withdrawal of the pleas, and to dismiss the indictment and information. Hernacki claimed that the original indictment was rendered by the grand jury after its term had expired, and thus was a nullity. He also contended that the information was tainted by the allegedly void indictment, and therefore the pleas entered on the information should be withdrawn and the information dismissed. In addition, it was suggested that the Government had a duty to disclose information pertinent to the length of the grand jury's term prior to the entry of the nolo contendere pleas. The defendants join the amicus curiae motions in all respects.

The critical issue in this case concerns the date on which a grand jury's service commences. Under Fed.R. Crim.P. 6(g), a grand jury may only serve for eighteen months. The grand jury in this case was impaneled and sworn on August 26, 1977, although it ostensibly was not to commence its term until September 12, 1977, pursuant to Local Rule 16 and the order of the impaneling judge. The grand jury's term was extended by court order to March 10, 1979. The indictment was returned on March 9, 1979. It was thus rendered within 18 months of September 12, 1977, but not within 18 months of August 26, 1977. The defendants and the petitioner argue that the earlier date marks the commencement of the grand jury's term of service. The Government contends that the later date is determinative.

These motions were not raised earlier because the date of the swearing of the grand jury was not revealed by the Government until after the nolo pleas were entered. The August 26 date may have been mentioned to counsel for the defendants in a telephone conversation shortly after the pleas were entered, although the defense counsel says he does not recall the conversation. At any rate, the Court was not informed of the date of the swearing of the grand jury, and defense counsel was not formally notified, until Mr. Hernacki resigned his position with the Justice Department and filed the present motions.

The Court must indicate its approval of Mr. Hernacki's conduct in seeking to assist the Court, whatever the eventual outcome of these motions. His deep and sincere concern for the accomplishment of justice led Mr. Hernacki to file these motions, although he suffered obvious personal detriment in opposing the position adopted by the Government. This kind of selfless dedication to principle and conscience is the epitome of the ethical standard to which all attorneys, especially prosecutors, should aspire. Such efforts to assist this Court in its task of administering justice must, and always will, be honored.

While the central issue of these motions may be easily stated, it is not easily resolved. Essentially, the Court is asked to determine when a grand jury commences "to serve", as that term is used in Rule 6(g). To reach an answer, the Court must examine Rule 6(g), any case interpreting it, and any rules and customs of this Court relevant to the formation of grand juries.

Fed. R. Crim. P. 6(g) provides that "[a] grand jury shall serve until discharged by the court but no grand jury may serve more than 18 months. The tenure and powers of a grand jury are not affected by the beginning or expiration of a term of court." This rule does not expressly define when a grand jury *commences* its service.

The petitioner and the defendants contend that grand jury service necessarily commences as of the time of impanelment and swearing, although they do not cite any cases interpreting Rule 6(g) for this proposition. Instead, they cite cases which imply that a grand jury commences service on the date of impanelment and swearing. *See, e.g., In re Special Grand Jury Impaneled February12, 1976,* 565 F.2d 1225, 1226 (1st Cir. 1977); *United States v. Stofsky,* 527 F.2d 237, 246-48 (2d Cir. 1975) *cert. denied* 429 U.S. 819 (1976); *Wax v. Motley, 510 F.2d 318, 319 (2d Cir. 1975); United States v. Handley,* 407 F. Supp. 911, 912 (ND Ind. 1976); *United States v. Chiarizio,* 388 F. Supp. 858, 864 (D. Conn.); *aff'd,* 525 F.2d 289 (2d Cir. 1975); *United States v. Fein,* 370 F. Supp. 466 (EDNY), *aff'd* 504 F.2d 1170 (2d Cir. 1974). In none of these cases, however,

did the courts address the specific issue of when a grand jury commences service. In the course of addressing other issues, such as whether a court may extend a grand jury beyond 18 months, *see, e.g., United States v. Fein, supra,* the courts referred to the date of impanelment and swearing as the commencement of the 18 month period. In the absence of discussion in these cases of the specific issue raised here, it is difficult to conclude that the grand jury necessarily commences service at the time of impanelment and swearing.[1]

Given the lack of any prevailing authority that the date of swearing must be used, the court must then determine whether the use of the subsequent date, September 12, is appropriate under Rule 6(g). Commencing the 18 month term from

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[1] Further support for the movants may be found by making an analogy to cases involving the double jeopardy doctrine. The Supreme Court has made clear that, in the case of a jury trial, jeopardy attaches when the jury is impaneled and sworn. *Serfass v. United States,* 420 U.S. 377, 388, 95 S.Ct. 1055, 1063 (1975); *Illinois v. Somerville,* 410 U.S. 458, 466, 93 S.Ct. 1066, 1071 (1973); *See also United States v. Wedalowski,* 572 F.2d 69, 74 (2d Cir. 1973). The word "sworn" refers to the trial jury oath and not the voir dire oath. *United States v. Wedalowski, supra; United States v. Green,* 556 F.2d 71, 72 (D.C. Cir. 1977). Once the trial jury is sworn, double jeopardy attaches even if the jury in fact does not hear any evidence, or does not deliberate and find any facts. *Crist v. Bretz,* _____ U.S. _____, 98 S.Ct. 2156, 2162 (1978). The Supreme Court has selected the time of swearing of a jury as critical for double jeopardy purposes on the theory that an accused has a right to be tried by a particular jury; once that jury has been selected and sworn, the accused has a right to a decision by that group. *Crist v. Bretz, supra,* 98 S.Ct. at 2161; *Wade v. Hunter,* 336 U.S. 684, 689, 69 S.Ct. 834, 837 (1949). These cases may stand for the proposition that a jury commences to serve when it is sworn, and not at any subsequent time. To the extent that grand and petit juries are similar, the application of that rule in this case would mean that the grand jury commenced its service on August 26. Of course, these cases are not dispositive on the issue raised on the pending motions. It must be remembered that the issue before this Court involves an interpretation of a Federal Rule of Criminal Procedure. The double jeopardy cases involve the application of a constitutional rule of entirely different considerations. For example, if Congress had expressly provided in Rule 6(g) that a grand jury commences service when it first hears evidence, there is nothing in the double jeopardy cases that would require striking down that rule in favor of application of a rule that the grand jury commences service on the date of swearing. Certainly, the constitutional rule of *Crist* and related cases is based on concerns about an accused's rights in trial that are wholly inapplicable to grand jury proceedings.

September 12, 1977 may be justified because the impaneling judge, relying on Local Rule 16, intended the grand jury to commence its service in September.

Local Rule 16 provides:

> "For the purpose of impaneling both grand and petit jurors [,] sessions of court in all divisions shall commence on the first Monday in March and the second Monday in September. . . .
>
> The chief judge, or any judge of the court who may accept delegation of authority from the chief judge so to do, shall impanel and discharge each grand jury; and each grand jury impaneled and sworn for a session of the court shall be ordered discharged by the chief judge or his delegate as soon as practicable after a grand jury shall have been impaneled and sworn for the session next following . . . . As soon as practicable, before or after commencement of each session of court, veniremen shall be impaneled and sworn to serve during the ensuing session and until ordered discharged by the court. . . ."

It is the custom in this court to call, impanel and swear grand jurors about two to three weeks before the commencement of the court session designated in Local Rule 16. *See* affidavits of Newell, Brosnan and Southern, attached to Response of United States to Joinder is Motion to Dismiss, etc., filed July 9, 1979. This procedure is followed in order to allow for an efficient processing of the many grand juror candidates, and to accommodate the chief judge's schedule. The grand jury in this case was sworn approximately two weeks before the second week in September. As appears from the affidavits submitted in opposition to the motions, and the order of the court impaneling the grand jury, the grand jury was sworn to serve for the September, 1977 session of court.

The parties have not considered whether the judge impaneling a grand jury may designate a date for the commencement of their service under Rule 6(g) other than the date on which

the jurors are sworn. The cases cited by the petitioner all involve situations where the jurors were impaneled, sworn and convened on one day, without any provision for their service to commence on a subsequent day. In this case, the Court believes that the impaneling judge clearly intended the grand jury to commence its service from the date in September, and not the date in August when the jurors were sworn.

Rule 6 gives the Court the powers to summons, impanel and discharge grand juries, without any limitation on the Court's power to arrange the time for commencement of service. Again, the Court is working with a paucity of precedent. In light of the broad powers granted to a court under Rule 6, however, the Court concludes that the grand jury may be ordered to commence service on a date subsequent to the date of impanelment and swearing; that such an order was issued here; and that the grand jury therefore commenced to serve on September 12, 1977.

The movants contend nonetheless that Rule 6(g), in providing that "[t]he tenure and powers of the grand jury are not affected by the beginning or expiration of a term of Court," precludes the application of Local Rule 16 insofar as it prescribes a time for impanelment based on the sessions of the court.

Whether application of Local Rule 16 is inconsistent with Rule 6(g) can be determined after examining the historical background of each rule. *In United States v. Fein, supra,* the court discussed the evolution of the present language of Rule 6(g). Prior to the adoption of Rule 6, 28 USC §421 provided that a grand jury could serve during a term of court, and that it could only be extended for up to three such terms. Justice Department dissatisfaction with non-uniform terms of court around the country led to an amendment of §421 in 1940 to allow for extensions of grand juries up to eighteen months. *United States v. Fein, supra,* 504 F.2d at 1175-76.

It was also provided in §421 that a grand jury could be extended "solely to finish investigations begun but not finished by such grand jury." As a result of this language, courts had to determine what matters a grand jury might consider after it had been extended past the court session in which it commenced its service. *See, e.g., United States v. Johnson,* 319 U.S. 503, 63 S.Ct. 1233 (1943).

Thereafter, the Federal Rules of Criminal Procedure were adopted. The current language of Rule 6(g) retained the eighteen month limitation on a grand jury's service, but provided for such service unless the court in its discretion terminated the service at an earlier date. All reference to the terms of court as a time limitation was eliminated, as was done in other rules. *See, e.g.,* F.R.Crim.P. 45(c); F.R.Civ.P. 6(c). This aspect of Rule 6(g) also reflected the elimination of sessions of court in 28 U.S.C. §136. The requirement that in an extended period a grand jury may only continue investigations previously commenced was also eliminated to obviate the controversy presented in *United States v. Johnson, supra.*

Local Rule 16 was adopted and effective on June 1, 1966. To a certain extent, it follows the law existing prior to Rule 6(g), in that it provides for the commencement of grand jury service in conjunction with the commencement of court sessions. It has not been subsequently amended.

After careful consideration of these rules, their language, and background, the Court concludes that the application of Local Rule 16 in this case is not inconsistent with Rule 6(g). Although Rule 6(g) might be read to imply that a grand jury term cannot be designated to begin on a date on which a court term commences, the Court believes that the Rule must be read in the context of its adoption. Rule 6(g) was adopted to prevent the disruption of grand juries by the expiration of a court term and the beginning of a new term, which once required the impaneling of a new grand jury. The added language of Rule 6(g) was meant to clarify that the term of the grand jury would run for eighteen months, unless sooner

discharged by the court, without reference to the length of the court's session. This rule governs the *length* of a grand jury's term. It is significant in this regard that Rule 6(g) speaks of the "*tenure*" of the grand jury; "tenure" implies length or duration of service. Hence, Rule 6(g) must be read as precluding a limitation on the length or duration of grand jury's service. It should not be read as mandating that the commencement of a grand jury's service may not coincide with the beginning of a court session, or that a court may not designate such a date for a grand jury to commence its service.

In addition, the pertinent language of Rule 6(g) was utilized to make clear that the powers of grand jury to undertake investigations was not to be affected by the expiration of one court term and the commencement of another. Again, this purpose for the adoption of Rule 6 should not be read as prohibiting the coincident commencement of a court session and a grand jury term.

Even beyond designating that the date of jury impanelment shall be the date of beginning of the court session, Local Rule 16 designates specific dates when impanelment shall occur, i.e., the first Monday in March and the second Monday in September. Thus, in the event that reference to terms of court is improper because of Rule 6(g) or 28 U.S.C. §136, Local Rule 16 sets forth specific calendar dates on which jury service may commence.

In conclusion, the Court holds that the Chief Judge may designate a date for the commencement of grand jury service and that reliance on Local Rule 16 to establish the date for commencement of grand jury service is not inconsistent with Rule 6(g). As a consequence of the conclusions adopted by the Court, the motions in this regard are denied.

Of course, if the grand jury term expired prior to the return of the indictment, the indictment would be invalid. *United States v. Macklin*, 523 F.2d 193 (2d Cir. 1975); *United States v. Fein, supra.* Even if the indictment were technically invalid

because it was returned after the expiration of an eighteen month grand jury term, however, the pleas and sentences in this case may be sustained.

The corporate defendant entered a nolo plea to the indictment. The Government could have prosecuted the corporation by information. Where the indictment is defective because it was returned after the grand jury's term, the Court may treat the indictment as an information and sustain the plea entered by the defendant.

Under the Fifth Amendment, "capital or otherwise infamous crimes" must be prosecuted by indictment. "Infamous crimes" have been defined by the Supreme Court as crimes punishable by imprisonment of greater than a year. *United States v. Moreland,* 253 U.S. 433, 42 S.Ct. 368 (1922); *Mackin v. United States,* 117 U.S. 348, 6 S. Ct. 777 (1886); *see also United States v. Neve,* 492 F. 2d 465 (7th Cir. 1974). Under Rule 7(a), an offence which may be punished by death or "which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment." An indictment must be used if the *potential* penalty may be imprisonment of more than one year.

Under 15 USC §1, amended in 1974, "every person who shall . . . engage in any combination of [sic] conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation . . . ." Thus, Armored Transport Inc. would in no event be subject to imprisonment of greater than one year, indicating that the corporation could have been prosecuted by information rather than indictment.

In *United States v. Macklin,* 339 F. Supp. 272 (E.D.N.Y. *aff'd on other grounds,* 523 F.2d 198, (2d Cir. 1975)), the court held that a corporation charged under 18 U.S.C. §1010 for submitting false statements in applications for federally insured mortgages, a crime for which an individual may be imprisoned for more than one year, could be prosecuted by information

because the corporation could not be sentenced to imprisonment. The Government in *Macklin* had proceeded by indictment against the corporation and an individual. The indictment had been rendered by a grand jury after its term had expired. The court dismissed the indictment against the individual, but chose to treat the indictment as an information against the corporation. As the information could be filed at any time by the Government, the court held that it had jurisdiction over the charge against the corporation. The same approach may be used to retain jurisdiction in this case and to sustain the plea of the corporate defendant.

The individual defendants did not plead guilty to the indictment rendered by the grand jury; instead, they plead guilty to a superseding information for a lesser offense. It is argued by the amicus petitioner that the information would be tainted by a defective indictment under a "fruit of the poisonous tree" rationale. *See, e.g., Nardone v. United States,* 308 U.S. 338, 60 S.Ct. 266 (1939).

An information may be filed under F.R. Crim.P. 7 at the discretion of the prosecutor. C. Wright, *Federal Practice and Procedure: Criminal,* § 121 at 213 (1969). An information may supersede an indictment. *See e.g., Gowdy v. United States,* 217 F.2d 730, 732 (9th Cir. 1953). Even assuming that the indictment is invalid, the prosecution could have chosen to proceed by information on the lesser offense at any time.

The movants have not cited any case holding that an information superseding an invalid indictment is also invalid. The authorities cited refer to a rule used to preclude the introduction of illegally obtained evidence. Obviously, that evidentiary rule has nothing to do with the situation in this case. An analogous rule should not be applied in the context of this case, where there is no direct correlation between the indictment and the information.

If there is no correlation between the indictment and the information, it is difficult to see how the defendants were prejudicially affected in making a plea to the lesser offense by

not knowing of the alleged infirmity in the indictments prior to making their pleas. Certainly, if defendants knew of the date of swearing, they could have moved to dismiss the indictment prior to entering their pleas, as they sought to do on a number of other grounds. But that still would not relieve them from a prosecution by information, which the Government could file at any time. Thus, whether they knew or did not know of the facts pertinent to the date of the grand jury impanelment is irrelevant to their pleas on the information.

Any contention that the threat of the indictment somehow coerced the pleas may be rejected on the basis of *Bordenkircher v. Haves,* ____ U.S. ____, 98 S. Ct. 663 (1978) where the Supreme Court held that due process was not violated by a prosecutor's threat of re-indictment on a more serious offense if the defendant did not plead guilty to an existing charge. The Court recognized that, while confronting the defendant with the risk of more severe punishment may discourage him from exercising his right to trial, "the imposition of these difficult choices is an inevitable and permissible attribute of any legitimate system which tolerates and encourages the negotiation of pleas." *Id.* at 668. The only limitation on the prosecutor's ability to threaten indictment on greater charges is the standard imposed on his discretion to seek charges at all, *i.d.,* [sic] there must be probable cause to believe that the accused has committed an offense defined by statute. *Id.*

Bordenkircher may easily be applied to the situation where the government has filed a series of charges, and negotiates with a defendant for a plea to one of the lesser charges. That situation occurs here, except for the added facts that the indictment on the greater offense may have been invalid and that the defendants did not know of the information on which the claim of invalidity could be made. The Court finds these additional factors to be irrelevant. The implication of *Bordenkircher* is that a threat of prosecution on a charge for which there is no cause may invalidate a negotiated plea. In the

instant case, it is not claimed that the Government lacked cause in seeking the indictment. The infirmity in the indictment, if any exists, is a technical one that could be easily remedied by resubmitting the case to the grand jury. In essence, the threat of a technically invalid indictment is similar to a threat of re-indictment in the future. The use of this kind of threat as a tactic in plea bargaining is recognized and expressly upheld in *Bordenkircher.*

For the reasons stated, the Court concludes that even if the indictments were invalid for the reasons asserted by the petitioner and defendants, the Court would still have jurisdiction over the case and would still sustain the pleas and sentences of the defendants.

Finally, the contention that the Government had a duty to disclose the date of the swearing of the grand jury must be rejected. The defendants rely on *Brady v. Maryland,* 373 U.S. 83, 93 S.Ct. 1194 (1963) to support their argument. As made clear in *United States v. Agurs,* 427 U.S. 97, 96 S.Ct. 2392 (1976), however, any duty under a *Brady* rationale is dependent on the specificity of any request for information made by the defense, and on the materiality of the particular information at issue. In this case, the *Brady* request of the defendants was general, and tantamount to making no request for specific information. *See United States v. Agurs, supra,* 427 U.S. at 106-7, 96 S.Ct. at 2399. The information in question was not material since it did not bear on the guilt or innocence of the defendants on the merits of the charges, *Id.* at 112, 95 S.Ct. at 2401-2, and, as the Court has decided that the grand jury term commenced on September 12, 1977, it would not have otherwise affected the outcome of the case.

For all of the reasons stated above, the motions of the petitioner and the defendants are denied, and the stay of the sentences of the defendants is hereby withdrawn.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk shall serve, by United States mail, copies of this Order on counsel for all parties and on the amicus curiae.

Dated: August 23, 1979

/s/ MALCOLM M. LUCAS

Malcolm M. Lucas
United States District Judge

No. 80-948

In the Supreme Court of the United States

OCTOBER TERM, 1980

ARMORED TRANSPORT, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTIONS PRESENTED

1. Whether petitioner, a corporation, has a constitutional right not to be prosecuted under Section 1 of the Sherman Act unless the charges are contained in a valid indictment returned by a grand jury.

2. If not, whether an allegedly defective indictment may be treated as an information that is adequate to charge petitioner.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-12) is reported at 629 F. 2d 1313. The opinion of the district court (Pet. App. B-1 to B-13) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 7, 1980. The petition for a writ of certiorari was filed on December 6, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On March 9, 1979, in the United States District Court for the Central District of California, a grand jury indicted petitioner and two of its officers for violating Section 1 of the Sherman Act, 15 U.S.C. 1. Petitioner pleaded *nolo contendere* and was fined $200,000.[1]

Under Local Rule 16 in the Central District of California (Pet. App. B-5), grand juries are authorized to serve for court sessions beginning on the first Monday in March and the second Monday in September. Grand juries are customarily called, impanelled, and sworn two to three weeks before the beginning of the court session during which they are scheduled to serve (*ibid.*).

The grand jury that indicted petitioner was impanelled and sworn on August 26, 1977, "for the September, 1977 session of court" (Pet. App. B-5). Pursuant to Local Rule 16, the session began on the second Monday of the month, September 12, 1977, (*id.* at B-2). The grand jury first sat to

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[1]The two officers pleaded guilty to a superseding criminal information charging them with a misdemeanor violation of the Sherman Act. They voluntarily dismissed their appeals in the Ninth Circuit (Pet. App. A-2) and are not seeking review here.

hear evidence on October 17, 1977 (Pet. App. A-2). On the government's motion, the chief judge of the district court twice extended the term of the grand jury. The second extension ended on March 10, 1979, the day after the indictment against petitioner was returned.

2. After sentencing, petitioner asked the district court to vacate the judgment, permit withdrawal of the *nolo contendere* plea, and dismiss the indictment. For the first time, petitioner contended that the indictment had been returned after the expiration of the maximum, 18-month term of service authorized for a federal grand jury by Fed. R. Crim. P. 6(g).

The district court denied post-conviction relief (Pet. App. B-1 to B-13). The court held that, under Local Rule 16, the grand jury did not begin to serve until September 12, 1977, the date on which the court's September 1977 session began, and that therefore the indictment was returned within 18 months of the beginning of the grand jury's service (Pet. App. B-6). The district court further concluded that Local Rule 16 is consistent with Fed. R. Crim. P. 6(g). The court noted that Rule 6 imposes no express limitation whatsoever on "the Court's power to arrange the time for commencement of [grand jury] service" (*ibid.*). Nor did the court find any implicit limitation in the Rule that would bar a district court from providing that a grand jury's service will commence at some time after impanelment and swearing where, as here, such a measure is designed "to allow for an efficient processing of the many grand juror candidates" (Pet. App. B-5 to B-8).

The district court also sustained petitioner's plea and sentence on an alternative ground. The court reasoned that the government could have prosecuted the corporation by information rather than indictment, because a corporation, by its nature, is not subject to imprisonment, and any offense

punishable only by a fine is not an "infamous crime" within the meaning of the Fifth Amendment guarantee of indictment by a grand jury (Pet. App. B-9 to B-10). Assuming *arguendo* that the indictment was returned by a grand jury whose term had expired, the court treated it as an information and held that it was adequate to sustain petitioner's *nolo* plea (*ibid.*).

3. The court of appeals affirmed, but only on the alternative ground adopted by the district court (Pet. App. A-1 to A-12). The court of appeals ruled first that the grand jury's term of service began on August 26, 1977, the date the jury was sworn and impanelled, and that the indictment was therefore invalid because it was not returned until more than 18 months later, in violation of Rule 6(g). In the court's view, Local Rule 16 is inconsistent with Rule 6(g). Although the court recognized that Rule 6(g) does not specify when a grand jury begins its term of service (Pet. App. A-4), it nonetheless concluded that separation of the date of impanelment from the date on which service commences is inconsistent with Rule 6(g)'s goal of national "uniformity in grand jury service" (Pet. App. A-4 to A-5). The court was also "concerned about the logical basis of a rule that permits creation of a grand jury that has no concomitant power to act" (*id.* at A-5). In addition, the court said, Rule 6(g) was intended to sever the prior relationship between grand jury terms and terms of court. To the extent, therefore, that Local Rule 16 requires that grand jury service be tied to the commencement of a term of court, the court of appeals thought the Local Rule contrary to the purpose of Rule 6(g) (Pet. App. A-5).

Although the court of appeals declared the indictment invalid, it agreed with the district court that petitioners had no right to indictment, because the crime charged was not "infamous" within the meaning of the Fifth Amendment.

The court of appeals held that "[t]he only punishment that is directly relevant to classification of a crime as infamous is the potential punishment that the statute imposes on the particular defendant being tried" (Pet. App. A-10). Because the Sherman Act provides that corporate defendants may be punished only by fine, and because a fine is not infamous punishment, the court concluded that the government could have chosen to proceed against petitioner by information rather than indictment (*id.* at A-9).

Treating the indictment as an information, the court held that the invalid indictment did not affect any substantial right of petitioner (Pet. App. A-11). Even if the indictment had been dismissed, the government would have been free to proceed against the corporation by information. Petitioner pleaded *nolo contendere*, and therefore "any advantage created by the grand jury discovery process was not used by the Government against appellant at trial" (*ibid.*). In any event, the court of appeals concluded, even if an information had been filed after the grand jury investigation was complete, the government would have been authorized, under Fed. R. Crim. P. 6(e)(3)(A), to use against petitioner materials and information obtained during the grand jury proceedings (*ibid.*).

ARGUMENT

Further review is not warranted in this peculiar case. In the first place, for the reasons stated by the district court, the indictment was not invalid. Although we do not believe that the interaction of Rule 6(g) and Local Rule 16 is a matter of sufficient importance to merit this Court's attention, we submit that the court of appeals erred in declaring that, under Rule 6(g), the grand jury's term of service must begin on the date of swearing and impanelment, irrespective of the district court's deliberate decision to postpone the commencement of the term until a date two or three weeks

later. In any event, the court of appeals' decision that petitioner has no right to an indictment is correct, does not conflict with any decision of this Court or any other court of appeals, and is unlikely to have any significant practical effect on future proceedings. Moreover, petitioner's contentions should not be cognizable at all on a request for post-conviction relief. Petitioner alleges, at most, mere formal defects in the timing of the grand jury proceedings. This kind of error, at least where discoverable before trial as in this case, should not be reviewed on collateral attack of a duly-entered judgment of conviction.

1. Although the district court's reasoning in this regard was rejected by the court of appeals, the judgment of conviction was properly affirmed because the indictment against petitioner was valid. The grand jury proceeding that resulted in the indictment conformed with Local Rule 16, and that rule does not conflict with Fed. R. Crim. P. 6(g). Rule 6(g) does not specify when grand jury service begins, and a local rule may define that point as long as it is consistent with the purposes of Rule 6(g). See Fed. R. Crim. P. 57(b). The purposes of Rule 6(g) are, first, to prevent a grand jury from coming unduly under the influence of the prosecutor by over-long association and, second, to provide that all federal grand juries have the same amount of time to transact their business. See, *e.g.*, *United States* v. *Fein*, 504 F. 2d 1170, 1178-1179 (2d Cir. 1974); Act of April 17, 1940, ch. 101, 54 Stat. 110; H.R. Rep. No. 1747, 76th Cong., 3d Sess. 1 (1940); S. Rep. No. 1396, 76th Cong., 3d Sess. 1 (1940). Local Rule 16 serves both these aims by restricting to 18 months the time the grand jury actually transacts business. Moreover, as the district court found (Pet. App. B-5), the Local Rule aids judicial administration.

There is no suggestion in this case that the brief delay between swearing of the grand jury and formal commencement of the grand jury's service prejudiced petitioner or

anyone else. There is also no indication that the procedure adopted by Local Rule 16 in fact gives rise to the kind of disparate practice among judicial districts that Rule 6(g) and its statutory predecessor were designed to eliminate (Pet. App. A-4 to A-5, B-6 to B-7). The asserted concerns underlying the court of appeals' opinion are theoretical at best and do not justify invalidation of a local court rule and dismissal of an indictment returned by a grand jury properly sitting under that rule.

2. Even if the indictment were defective, petitioner would not be entitled to relief. Petitioner contends (Pet. 4-14) that all crimes that are classified as felonies are infamous and that, because violation of Section 1 of the Sherman Act is a felony, all prospective defendants, including corporations, have a constitutional right not to be held to answer unless charged by indictment. Although vigorously advanced, this argument is incorrect.

The decisions of this Court establish that the nature of the punishment that may be imposed, not an abstract judgment about the nature of the offense, determines whether a crime is infamous for purposes of the Fifth Amendment. See, *e.g.*, *Mackin* v. *United States*, 117 U.S. 348, 350 (1886). Punishment by fine is not infamous. See, *e.g.*, *Green* v. *United States*, 356 U.S. 165, 183 (1958); C. Wright, *Federal Practice and Procedure* § 121, at 212 (1969).[2] Accordingly, because petitioner is subject only to a fine, it is not constitutionally entitled to an indictment. Nor can the corporation derive such a right from the exposure of its co-conspirators

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[2]The Ninth Circuit, in *United States* v. *Yellow Freight System, Inc.*, Nos. 79-1665, 79-1666 (Oct. 17, 1980), stated that in "extremely rare" instances, such as a congressional declaration of infamy, a crime that doe not carry an infamous punishment might be made infamous by some other factor. See also Pet. App. A-7, A-8, A-9 n.3. Petitioner, however, cannot point to any such extraordinary consideration here (see Pet. 10 & nn. 6, 7).

to the infamous punishment of imprisonment under the Sherman Act (Pet. App. A-10). Here the corporation, unlike the individual defendants, was in no "danger of infamous punishment" (*United States* v. *Moreland*, 258 U.S. 433, 441 (1922); see also *Mackin* v. *United States*, *supra*, 117 U.S. at 351; *Ex parte Wilson*, 114 U.S. 417, 426 (1885)), and therefore it had no right to be indicted.

Petitioner attempts to avoid the logic of this argument by citing decisions holding that natural persons charged with felonies are entitled to indictments (Pet. 6-10). That rule is not involved here and it is not in dispute. Individuals have a right to indictment for felonies because when so charged they face the infamous punishment of imprisonment in a penitentiary. *Parkinson* v. *United States*, 121 U.S. 281 (1887).[3] This rationale provides no support for a corporation's claim to a parallel right, because a corporation cannot be imprisoned.[4]

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[3]Under 18 U.S.C. 4083, persons may be confined in a United States penitentiary if convicted of offenses against the United States punishable by imprisonment for more than one year. And under 18 U.S.C. 1, an offense punishable by imprisonment for more than a year is defined as a felony. Thus, courts have found it convenient to refer generally to felonies as "infamous" crimes, for which indictment is required. See, *e.g.*, *Stirone* v. *United States*, 361 U.S. 212, 215 (1960).

[4]*Baldwin* v. *New York*, 399 U.S. 66 (1970), on which petitioner heavily relies (Pet. 7, 9 n.5), does not concern grand juries at all, but rather the definition of a "petty" offense that constitutionally may be tried without a petit jury.

Petitioner also argues (Pet. 11-14) that the decision below precludes the grand jury from performing its historic function of protecting against hasty or oppressive prosecution. The cases on which petitioner relies (see, *e.g.*, *United States* v. *Dionisio*, 410 U.S. 1, 16, 17 (1973); *Wood* v. *Georgia*, 370 U.S. 375, 390 (1962); *Jones* v. *Robbins*, 8 Gray 329 (Mass. 1857), cited in *Ex parte Bain*, 121 U.S. 1, 12 (1887)), however, do not refer to rights of corporations, but to rights of "individual citizens", "civilians," and "individuals." The purpose of the Indictment Clause is to protect "individual citizens * * * from the trouble, expense, and anxiety of a public trial before a probable cause is

There is no conflict among the circuits on the issue presented. No court has ever held that, for a particular class of criminal charges, a corporation may not be held to answer except by indictment. The slim precedent on the issue accords with the court of appeals' holding. See *United States* v. *Macklin*, 389 F. Supp. 272, 273-274 (E.D.N.Y.), aff'd on other grounds, 523 F. 2d 193 (2d Cir. 1975).

The paucity of precedent, of course, indicates that the issue has not been a significant one. Nor is it likely to become important in the future. Where, as is ordinarily the case, individuals are co-defendants with corporations, the government generally will proceed against all parties by indictment because of the obvious convenience of a single charging document. Similarly, an indictment will generally be used even in those few cases where only a corporation is charged, because grand juries generally investigate antitrust and other corporate crimes and grand juries return indictments as their accusations. For these reasons, petitioner does not present an issue of recurring importance meriting review by this Court.

3. Petitioner also argues (Pet. 14-16) that, even if the government could have proceeded by information initially, as the courts below held, the indictment should not now be treated as an information. But, if the Constitution does not

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established by the presentment and indictment of a grand jury." *Ex parte Bain, supra*, 121 U.S. at 12. The same considerations are simply not pertinent to a corporation, as this Court has recognized in declining to apply the Fifth Amendment's protection against self-incrimination to corporations. See *United States* v. *White*, 322 U.S. 694, 698-699 (1944).

The corporation is, of course, entitled to trial by jury when charged by information with violating the Sherman Act. The "economic ruin" that petitioner predicts (Pet. 5, 14) cannot be generated by the prosecutor's charging decision alone.

give petitioner the right to insist on an indictment, the corporation cannot obtain that right merely because the government chose to proceed by indictment in this case.

Petitioner suffered no prejudice from the procedure followed here. We may assume for the sake of argument that relief might be warranted if the prosecutorial decision to proceed by indictment rather than information had some objective deleterious effect on the disposition of the criminal charges against petitioner. No such negative consequences followed from the indictment in this case, and petitioner should not be permitted to withdraw its plea.[5] Petitioner entered its *nolo contendere* plea only after consulting with competent counsel and assessing the evidence against it. Notwithstanding petitioner's current assertion (Pet. 15), it surely would have reached an identical decision if the government had filed an information, rather than an indictment, based on the same evidence. Similarly, even if

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[5]Petitioner contends that the result below conflicts with *United States* v. *Goldstein*, 502 F. 2d 526 (3d Cir. 1974). But *Goldstein* did not involve treating an indictment as if it had been an information filed in identical form; it involved an attempted amendment of an indictment without resubmission to the grand jury, in circumstances in which the court had reason to believe that the grand jury might not have voted to indict if it had had more complete information before it. Even *Goldstein* apparently held that reversal is only required where prejudice is shown. To be sure, the Third Circuit seemed willing to assume prejudice, in part on the ground that the prosecution may have obtained discovery through use of the grand jury and in part on the ground that a "subtle, though undeniable, stigma" attaches at trial to a defendant charged in an indictment rather than an information. *Id.* at 531. Whatever the merit of the court of appeals' reasoning, there was no such prejudice here. The case did not go to trial. And the possibility that the grand jury may have been used to obtain discovery against petitioner cannot carry much weight, since the government could have proceeded by information immediately upon the filing of the motion at issue here and could have used the grand jury materials at trial. See Fed. R. Crim. P. 6(e)(3)(A); Pet. App. A-11.

the grand jury in fact served for 18 months and 12 days rather than 18 months, that irregularity did not compromise petitioner's position. The 12 days of service that allegedly exceeded the period permitted by Rule 6(g) did not threaten grand jury independence. There is no reason to believe that, if the grand jury had concluded its deliberations 12 days earlier, its charging decision would have been different. Finally, because the case was never tried, no trial jury was ever exposed to the indictment or to the evidence that led the grand jury to return it. The use of an indictment therefore had no adverse effect on petitioner.

4. In any event, affirmance of petitioner's conviction is proper, because the alleged defect in the indictment may not be raised now on collateral attack, in the form of a request to withdraw petitioner's *nolo contendere* plea. The defect, if any, is not jurisdictional. The 18-month limitation on the grand jury's term of service is contained only in Rule 6(g), and that Rule is not an Act of Congress. It was promulgated by this Court and never amended by Congress. See C. Wright, *Federal Practice and Procedure, supra*, at 5-7; Notes of the Advisory Committee on Rule 6. As this Court stated in *United States* v. *Timmreck*, 441 U.S. 780, 783-784 (1979) (concerning a formal violation of Fed. R. Crim. P. 11), "[s]uch a violation is neither constitutional nor jurisdictional: * * * [the Rule] obviously could not amend the Constitution or limit the jurisdiction of the federal courts."

Similarly, Rule 6(g) does not limit the jurisdiction of the district court, and any violation of its 18-month limitation cannot be raised on collateral attack. The alleged defect concerns only the time at which grand jury proceedings began and the time at which the prosecution was instituted. This complaint should have been raised before trial. See Fed. R. Crim. P. 12(b), and the accompanying Notes of the

Advisory Committee. See also *Tollett* v. *Henderson*, 411 U.S. 258, 266-269 (1973) (post-conviction challenge to grand jury selection will not be entertained unless defendant can show incompetence of counsel in failing to raise issue before guilty plea); *Shimon* v. *United States*, 352 F. 2d 449, 451 (D.C. Cir. 1965) (grand jury acting beyond the term prescribed by D.C. Code could return valid indictment); *United States* v. *Mitchell*, 389 F. Supp. 917, 917-920 (D.D.C.), aff'd on other grounds, 559 F. 2d 31 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977) (alleged unlawful extension of grand jury term was at most a defect in institution of proceedings, and did not deprive the court of jurisdiction). Contra, *United States* v. *Macklin*, 523 F. 2d 193 (2d Cir. 1975). Nothing in the record suggests that, at the time the indictment was returned, petitioner could not have discovered when the grand jury was sworn and impanelled and when its term of service began under Local Rule 16. At least under these circumstances, there is no justification for permitting petitioner to withdraw its plea after entry of a judgment of conviction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1981

DOJ-1981-02

No. 80-948

IN THE

Supreme Court of the United States

October Term, 1980

ARMORED TRANSPORT, INC.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

INTRODUCTION.

The petition for writ of certiorari was timely filed herein on December 6, 1980. Although the government obtained an extension of time to respond to February 2, 1981,[1] no opposition to the petition was in fact filed on or before that date. One week later, on February 9, 1981, the government filed an untimely document described as a brief in opposition.

Distilled to its essentials, the government's untimely brief opposes review on three grounds: (1) the decision of the Ninth Circuit that corporations and other non-natural per-

[1]The Clerk's letter of January 7, 1981 states clearly, "Your recent request for an extension of time . . . has been granted, and the time has been extended but only to and including February 2, 1981. No further extensions will be granted. . . ."

sons may be prosecuted for felony violations without the Fifth Amendment guarantee of an indictment is correct and does not conflict with the decisions of other courts; (2) the ruling is "unlikely to have any significant practical effect on further proceedings" because the government ordinarily will proceed against all parties by way of indictment as a matter of preference, even without the existence of a constitutional right; and (3) an admittedly invalid indictment can be salvaged after the fact by treating it as an information since no prejudice follows from such a procedure.

In addition to the above arguments, and despite the fact that it has filed no cross-petition for certiorari, the government further asserts that the Ninth Circuit was wrong in holding this indictment invalid because it was rendered after the term of the grand jury expired. Similarly the government asserts that both the Ninth Circuit and the district court erred in holding that an indictment rendered by a grand jury whose term has expired is a nullity that creates a non-waivable jurisdictional defect which can be raised at any time. Instead, the government says that such an invalid indictment is a mere formal defect that cannot be raised by what it terms "collateral attack."

For the reasons discussed herein, the government's contentions are without merit, and review should be granted.

II.

THE NINTH CIRCUIT RULING CONFLICTS WITH NUMEROUS PRIOR RULINGS AND PRESENTS IMPORTANT CONSTITUTIONAL ISSUES OF GENERAL APPLICABILITY.

In its strained attempt to trivialize the fundamental issues presented here, the government's brief totally ignores hundreds of years of history and the decisions of this Court and other federal tribunals. As outlined on pages 6-10 of the petition, the common law of England, followed by the

Founding Fathers in drafting the indictment clause of the Fifth Amendment, and the rulings of numerous federal courts establish that indictments are required in all felony prosecutions. *E.g., Stirone v. United States,* 361 U.S. 212, 215 (1960): "The crime charged here is a felony and the Fifth Amendment requires that the prosecution be begun by indictment." The petition at the pages indicated cites decisions of the Sixth Circuit, the D.C. Circuit, the Third Circuit, the Fifth Circuit and various district courts, all of which reflect the understanding that all felonies are infamous or serious crimes which trigger the Fifth Amendment indictment guarantee. The government apparently asks this Court to ignore the unique view of the Ninth Circuit, which would select for special treatment all corporations and non-natural persons (such as partnerships, unincorporated associations and others which cannot be imprisoned) and would deny them the critical Fifth Amendment protection of an indictment.

The government further suggests that the denial of this constitutional right to an entire class of entities need not be taken seriously. Even without such a guarantee the government asserts that it can be expected to proceed by indictment as a general matter of preference. But this is no more credible than the government's out-of-hand dismissal of the history and fundamental purposes of the right to an indictment on serious felony charges. The fact that the government has not attempted to proceed by information in such cases in the past may have resulted in a lack of precedent on this issue, but it provides absolutely no security for the future. Instead, the government's indictment practice simply reflects its understanding and construction, shared almost universally, that felony charges require an indictment. The government did not attempt to proceed by an information in the first instance even in this case. Its position that it does

not need an indictment has been urged only as a post hoc rationalization to save a moribund indictment and to suit its own convenience.

The assertion that the new rule of law in the Ninth Circuit will have no immediate and recurring impact on corporations and other fictional entities and the government's promise that it will "go and sin no more" is plainly belied by the Ninth Circuit's opinion in *United States v. Yellow Freight System, Inc.*, ... F.2d .... (9th Cir. 1980) (slip op.), rendered on October 17, just 10 days after the opinion in this case. Conjecture about how the government may choose to proceed in the future cannot substitute for enforcement of the constitutional right to an indictment.

III.

WHERE THE GOVERNMENT HAS PROCEEDED BY INDICTMENT, AN INVALID JUDGMENT ENTERED THEREON CANNOT BE REVIVED EVEN IF PROSECUTION COULD HAVE BEEN BY INFORMATION.

In its opposition, the government argues that since there is no constitutional right to an indictment, the invalid indictment here may form the basis for sustaining a conviction because no negative consequences followed from the indictment. Such a procedure of rewriting the record against a criminal defendant by hindsight denies fundamental due process protections. *See United States v. Pandilidis*, 524 F.2d 644 (6th Cir. 1975), *cert. denied*, 424 U.S. 933 (1976) and *United States v. Goldstein*, 502 F.2d 526 (3d Cir. 1974) (en banc), discussed at pages 14-16 of the petition. Further, to salvage a jurisdictionally deficient conviction by speculation as to what the government could have done allows the government to obtain the benefits of proceeding by indictment without shouldering the attendant burdens.

Even if a showing of prejudice were required, it is plainly present here. The "negative consequences" which followed

for the corporation included a felony conviction and a fine in the amount of $200,000, all pursuant to a nolo plea which would not have been entered had the defendant known of the indictment's invalidity at the time of its plea.[2]

IV.

THE NINTH CIRCUIT CORRECTLY RULED THAT AN INDICTMENT RETURNED BY A GRAND JURY WHOSE TERM HAS EXPIRED IS A NULLITY AND CREATES A NON-WAIVABLE JURISDICTIONAL DEFECT.

Even if this Court were to consider the government's challenge to portions of the Ninth Circuit's ruling herein without the filing of a cross-petition,[3] it is plain that both the district court and the Ninth Circuit correctly recognized the well-established rule that an indictment returned by a grand jury whose term has expired is a nullity. Pet. App. A-3, B-8. Such invalidity creates a non-waivable jurisdictional defect which can be raised at any time during the proceedings. The Ninth Circuit stated: "If, however, the first date of service is the impanelment date, the indictment is invalid because handed down by an expired grand jury. [Citations omitted.] Such a defect — that the grand jury lost its power to hand down indictments — is jurisdictional and may be raised at any time. [Citations omitted.]" Pet. App. A-3.[4]

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[2]Even the district court held that the date on which the grand jury began to serve was not disclosed by the government until after the nolo pleas were entered. Pet. App. B-2.

[3]Supreme Court Rule 21.1(a) provides, "Only the questions set forth in the petition or fairly included therein will be considered by the Court." *See, e.g., Namet v. United States*, 373 U.S. 179, 190 (1963).

[4]*See also United States v. Gale*, 109 U.S. 65, 72 (1883); *United States v. Macklin*, 523 F.2d 193 (2d Cir. 1975); *United States v. Fein*, 504 F.2d 1170 (2d Cir. 1974); *United States v. Heath*, 509 F.2d 16 (9th Cir. 1974); *Evaporated Milk Ass'n v. Roche*, 130 F.2d 843 (9th Cir. 1942), *rev'd on other grounds*, 319 U.S. 21 (1943); *United States v. Perlstein*, 39 F.Supp. 965, 970 (D.N.J.), *aff'd*, 126 F.2d 789 (3d Cir. 1941), *cert. denied*, 316 U.S. 678 (1942); *United States v. McKay*, 45 F.Supp. 1007 (E.D. Mich. 1942); *see United States v. Johnson*, 319 U.S. 503, 508 (1943); *Ex Parte Bain*, 121 U.S. 1, 13 (1887).

Thus, the government's attempt to argue that the defect in the indictment here was one of mere formality which cannot be raised by "collateral attack" must fail because it is not properly raised and because it is totally contrary to all applicable authorities and was rejected both by the Ninth Circuit and the district court.

The government's contentions that this case is not appropriate for writ of certiorari because all that is involved is the interaction of Federal Rule of Criminal Procedure 6(g) and a local rule, and that petitioner should have raised the issue of the invalidity before entering its plea, must be rejected for the same reasons. What was at stake below was not some peculiar local rule but the fundamental issue of whether by court rule or judicial intent the limited statutory 18-month life of a grand jury could be extended. The Ninth Circuit properly held that no such extension is possible and that no indictment or jurisdiction may flow from a grand jury that has lost its power to act. Both courts below also correctly held not only that the matter could be raised at any time but also that the reason it was not raised before the plea and conviction was that the government deliberately chose to suppress the facts regarding the date of impanelment. Indeed, the government only disclosed such facts after the government attorney in charge of this prosecution had resigned and filed an amicus petition setting forth the impanelment date and revealing that the indictment issued after the grand jury became powerless. As stated by the district court, "These motions were not raised earlier because the date of the swearing of the grand jury was not revealed by the Government until after the nolo pleas were entered." Pet. App. B-2.

V.

CONCLUSION.

For all the reasons stated above and in the petition herein, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

DATED: February 12, 1981.

Respectfully submitted,

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